

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)	
NORTHWEST AIRLINES, INC.,)	
)	
Appellant,)	PCHB No. 77-9
)	
v.)	FINAL FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
STATE OF WASHINGTON,)	AND ORDER
DEPARTMENT OF ECOLOGY,)	
)	
Respondent.)	

This matter, the appeal from a \$1,000 civil penalty for an alleged oil spill, having come on regularly for a formal hearing before Board Members Chris Smith and Dave J. Mooney on May 11, 12 and 13, 1977 at Bellevue and July 21 and 22, 1977 at Seattle-Tacoma International Airport, and appellant Northwest Airlines appearing through its attorney, James A. Abbott, and respondent Department of Ecology appearing through Jeffrey D. Goltz, Assistant Attorney General with William A. Harrison, hearing examiner presiding and the Board having considered the sworn testimony, exhibits, records and files herein and having entered on the 19th day of

1 October, its proposed Findings of Fact, Conclusions of Law and Order, and
2 the Board having served said proposed Findings, Conclusions and Order
3 upon all parties herein by certified mail, return receipt requested and
4 twenty days having elapsed from said service; and

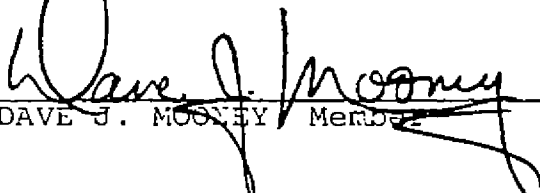
5 The Board having received exceptions to its proposed Findings,
6 Conclusions and Order from appellant, and a reply thereto from respondent,
7 and a further response to respondent's reply, from appellant, and having
8 accorded its closest consideration to each, and the Board being fully
9 advised in the premises; now therefore, appellant's exceptions are denied
10 and

11 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed
12 Findings of Fact, Conclusions of Law and Order, dated the 19th day of
13 October, 1977, and incorporated by reference herein and attached hereto
14 as Exhibit A, are adopted and hereby entered as the Board's Final
15 Findings of Fact, Conclusions of Law and Order herein.

16 DONE at Lacey, Washington, this 13th day of December, 1977.

17 POLLUTION CONTROL HEARINGS BOARD

18 
19 CHRIS SMITH, Member

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21 DAVE J. MOONEY, Member

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27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
NORTHWEST AIRLINES, INC ,)
Appellant,)
v)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 77-9

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

This matter, an appeal of a \$1,000 civil penalty levied for an alleged oil spill under RCW 90.48.350, came on regularly for hearing before the Pollution Control Hearings Board on May 11, 12 and 13, 1977 at Bellevue, and on July 21 and 22, 1977 at Seattle-Tacoma International Airport. Present at hearing were Hearings Board members Chris Smith and Dave J. Mooney. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant, Northwest Airlines, Inc, appeared by and through its attorney and Vice President, James A. Abbott. Respondent appeared by and

EXHIBIT A

1 through its attorney and Assistant Attorney General, Jeffrey D. Goltz
2 Gene Barker, Olympia court reporter provided reporting services.

3 Witnesses were sworn and testified Exhibits were examined. The
4 Hearings Board, counsel and others conducted a view of sites pertinent
5 to the litigation events including the ramp area and hydrant at gate S-8
6 of Seattle-Tacoma International Airport and the sewer outfall into Des
7 Moines Creek located at the Olympic tank farm

8 Appellant has moved to dismiss the charge against it on grounds that
9 the respondent has failed to make a prima facie case of violation. The
10 motion is denied

11 Respondent has objected to testimony and exhibits offered by appellant
12 which pertain to a) "the second dye test", conducted December 14, 1976, and
13 b) exhibits involving the mixing of oil and water, particularly those sa 1
14 jars marked A-9, A-10, A-13 and A-18. The objections are overruled, and
15 the testimony and exhibits are hereby admitted

16 Having heard the testimony, having examined the exhibits, having read
17 the briefs of counsel and being fully advised, the Pollution Control
18 Hearings Board makes these

19 FINDINGS OF FACT

20 I

21 Respondent, by its "Notice of Penalty Incurred and Due" (DE 76-326,
22 dated October 15, 1976) imposed a civil penalty of \$1,000 upon appellant
23 for an alleged negligent oil spill which occurred August 3, 1976, at
24 gate S-8 of Seattle-Tacoma International Airport Appellant's application
25 for relief from this penalty was denied by respondent ("Notice", DE 76-326,
26 dated January 18, 1977), and appellant thereafter filed a timely Notice
27 of Appeal to this Hearings Board

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

II

Appellant, Northwest Airlines, Inc., is a well known carrier whose flights have long arrived and departed at Seattle-Tacoma International Airport. Terminal gate S-8 is one of the customary locations at which passengers board and deplane from Northwest flights

III

Apparatus exists for fueling Northwest aircraft as they stand on the paved area (ramp) in front of the terminal at gate S-8. Jet fuel comes by pipeline to a remote tank farm owned by the Olympic Pipeline Company ("Olympic tank farm"). From this, another pipeline equipped with a "skid" device leads to appellant's storage tanks

Yet another pipeline, with its own pumps and shut-off valves leads out of appellant's storage tanks to a hydrant on the ramp at gate S-8.

When appellant's storage tanks run low, the "skid" automatically activates and fuel from the Olympic tank farm flows into and refills appellant's storage tanks, stopping when the latter are full. This apparatus, from skid to hydrant, is depicted in Exhibit R-15.

IV

On the morning of August 3, 1976, maintenance employees of appellant undertook to replace the hydrant at gate S-8. Preparatory to doing so, they turned off the discharge pumps on the pipeline leading from appellant's storage tanks to the hydrant. They also opened a certain "interconnect valve" to relieve pressure in the system. (See Exhibit R-15.) As they next proceeded to loosen the hydrant in order to replace it, the low level of fuel in one of appellant's storage tanks triggered automatic activation of the skid. Had the interconnect valve been in its normal closed position, jet fuel from the Olympic tank farm would have gone

1 exclusively to appellant's storage tanks Because the interconnect
2 valve had been opened by appellant, jet fuel flowed to the loosened
3 hydrant, filled a pit in which the hydrant was located and overflowed
4 onto the ramp

5 The oil thus spilled onto the ramp was owned by appellant, and
6 the transfer apparatus from skid to hydrant was under appellant's control.

7 V

8 After attempting to contain the spill by use of a hand pump, which
9 proved futile, appellant's employee, at 9 57 a.m., called the airport
10 fire department, an agency of the airport owner, the Port of Seattle.

11 Reference is now made to Exhibit R-4 Prior to any action by the
12 airport fire department, appellant's oil was flowing into strip drain No 2
13 and westerly toward drains Nos 1 and 3. Upon arrival at 10 00 a.m., the
14 fire department began washing down the ramp with high pressure hoses. A
15 total of 30,000 gallons of water was used to drive the spilled oil from
16 the ramp into the ramp drains The total oil spilled onto the ramp being
17 approximately 400 gallons, and some small amount of that having flowed
18 directly into strip drain No. 2 before fire department action, and, three
19 quarters (3/4) of the remaining oil being flushed into strip drain No 2
20 by the fire department, therefore more than 300 gallons of appellant's
21 oil entered strip drain No. 2 This amount of oil was carried by
22 sufficient water to pass it entirely through the connecting storm sewer
23 to the sewer's point of discharge The storm sewer connected to strip
24 drain No 2 discharges exclusively into Des Moines Creek. The point of
25 discharge of strip drain No 2 was unknown to the attending airport
26 firemen, whose primary or sole concern was that the oil, and the danger
27 of fire that it posed, be removed from the airport ramp

Where, as here, a pollutant, such as jet fuel oil, enters a storm sewer with a sufficient amount of water to carry it to the point of discharge, and where the discharge is exclusively into a water of the state, an inference arises that such pollutant enters the waters of the state. From this inference, we find that the appellant's oil which entered strip drain No. 2 (more than 300 gallons) passed to the point of discharge and entered Des Moines Creek, a water of the state.

VI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

The Notice of Penalty, No. 76-326, charges that appellant was assessed the instant penalty under the provisions of RCW 90.48.350 which state, in pertinent part:

Any person who intentionally or negligently discharges oil, or causes or permits the entry of the same, shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to twenty thousand dollars for every such violation, said amount to be determined by the director of the commission after taking into consideration the gravity of the violation, the previous record of the violator in complying, or failing to comply, with the provisions of chapter 90.48 RCW, and such other considerations as the director deems appropriate. Every act of commission or omission which procures, aids or abets in the violation shall be considered a violation under the provisions of this section and subject to the penalty herein provided for . . .

We construe the word "entry" to mean entry into "the waters of the state"

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

as set out elsewhere in the statute at RCW 90 48 320 For the reasons that follow, we conclude that appellant has violated RCW 90 48 350, and is liable for the penalty assessed by respondent under that section

II

Negligence In failing to coordinate the setting of the skid and the interconnect valve with the process of changing its ramp hydrant, appellant, who owns, controls and is cognizant of the functions of this equipment, was negligent

III

Causation We come now to the question of whether appellant's negligence caused the prohibited entry of oil into the water. The rule of causation in Washington state was well stated in Stoneman v Wick Construction, 55 Wn 2d 639 (1960)

The "proximate cause" of an injury is that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred.

We first conclude that without the negligence of appellant in the operation of its fueling system, oil would not have flowed onto the airport ramp, and thus would not have entered the water in this instance. We further conclude that the intervention of the Port of Seattle fire department, through its flushing of the oil from the ramp into the drain and waters of the state was not an independent cause, nor did it break the natural causal link between appellant's negligence and the entry of oil into the water We are guided in this last conclusion by the rule long held in Washington state and expressed in Swanson v Gilpin 25 Wn 2d 147 (1946)

A third person's intervening act is not a superceding cause

1 to another, which the actor's negligent conduct is a
2 substantial factor in bringing about, if the actor at the
3 time of his negligent conduct should have realized that a
4 third person might so act, or a reasonable man knowing the
5 situation existing when the act of the third person was done
6 would not regard it as highly extraordinary that the third
7 person had so acted, or the intervening act is a normal
8 response to a situation created by the actor's conduct, and
9 the manner in which the act is done is not extraordinarily
10 negligent

11 See also Theurer v. Condon, 34 Wn.2d 448 (1949). Gies v. Consolidated
12 Freightways, 40 Wn 2d 488 (1952) and Jones v. Leon, 3 Wn App. 916 (1970).

13 In flushing the large quantity of jet fuel down the nearest drain, the
14 Port of Seattle, though blameworthy in not knowing the drain's point of
15 discharge, was not extraordinarily negligent. Rather, appellant should
16 have realized that the substantial danger of fire posed by its spill of
17 jet fuel might lead to the fire department taking the very measures which
18 it did

19 We conclude that appellant's negligence caused the entry of oil into
20 the water.¹

21 IV

22 Entry. Des Moines Creek, into which the oil was carried, is a
23 water of the state of Washington.

24 1 Even assuming the reverse of what we have concluded, namely, that the
25 Port of Seattle was "extraordinarily negligent" in flushing the oil into
26 a drain leading to waters of the state, there is a similar result. This is
27 so because appellant has, by its initial spill onto the ramp, in the words
28 of RCW 90 48 350, "procured, aided or abetted" the Port's "extraordinary
29 negligence" which resulted in the entry of oil into waters of the state.
30 This is also a violation of RCW 90 48 350

1
2 Statutory Affirmative Defenses Appellant invokes the language
3 of RCW 90 48 320 which states in pertinent part

4 This section shall not apply to discharges of oil
5 in the following circumstances

6 (3) Where a person having control over the oil can prove
7 that a discharge was caused by.

8 (b) negligence on the part of the United States government
9 or the state of Washington (Emphasis added)

10 Appellant contends that the Port of Seattle, through its fire department,
11 fulfilled the requirements of this section, and that therefore appellant
12 must be exculpated by it. We find no merit in this contention. The Port
13 of Seattle, by RCW 53 04.060 is a municipal corporation. Such an entity
14 with highly localized jurisdiction, does not meet the threshold
15 requirement of being "the state of Washington." Were we to equate
16 municipalities with the state of Washington, we would be interpreting
17 the above quoted language so as to make it self-nullifying in instances
18 where the "person" involved is, itself, a municipality. "Person" is
19 defined to include "municipality" at RCW 90 48.315(8). We further note
20 that the legislature has made separate references to "the United States
21 government", "the state of Washington", and "municipality" at different
22 sections of 90 48 RCW. We thus conclude that had the legislature meant
23 to include municipalities within RCW 90 48 320(3)(b), it would have
24 done so expressly. Actions of the Port of Seattle, through the operation
25 of this section, therefore do not exculpate nor excuse the appellant.

26 Appellant invokes the same language of RCW 90 48 320, above, to
27 contend that respondent, by issuance of a "National Pollutant Discharge
Elimination System" permit for the airport, likewise exculpated appellant.

FINDINGS OF FACT,

1 through alleged mass approval of the airport drain system, including
2 the specific drain in question here. As the permit was not introduced into
3 the evidence, its exact provisions are left to speculation, and we
4 conclude that the references made to that permit, in testimony, do not
5 sufficiently reveal the nature of respondent's approval of the drain in
6 question, if any, to conclude that such approval, if any, was negligent.
7 Such evidence is not sufficient to exculpate nor excuse the appellant
8 through the operation of RCW 90.48.320.

9 For these reasons, we need not decide whether the language of
10 RCW 90.48 320 quoted above is available to one assessed with a civil
11 penalty for negligence under RCW 90.48 320.

12 VI

13 Amount of Penalty. The appellant negligently caused the entry of
14 more than 300 gallons of oil into the waters of the state of Washington.
15 We conclude that a civil penalty of \$1000, or 1/20 of the allowable
16 statutory maximum (RCW 90.48.350), is amply justified by the evidence
17 in this case.

18 VII

19 We have reviewed the other legal contentions made by appellant
20 and find them to be without merit

21 VIII

22 Any Finding of Fact which should be deemed a Conclusion of Law
23 is hereby adopted as such

24 Accordingly it is the Hearings Board's

25 ORDER

26 The \$1,000 civil penalty here appealed, and imposed by Notice No
27 DE 76-326, is hereby affirmed

4

DONE this 19th day of October, 1977

POLLUTION CONTROL HEARINGS BOARD

Chris Smith
CHRIS SMITH, Member

Dave J. Mooney
DAVE J. MOONEY, Member